

FARM DEVELOPMENT CORP.

IBLA 87-234

Decided November 21, 1988

Appeal from a decision of the Jarbridge Area Manager, Boise, Idaho District, Bureau of Land Management, denying road right-of-way application I 21057.

Affirmed.

1. Rights-of-Way: Generally--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

A right-of-way application for road access to desert land entries was properly rejected where the application was not made by the desert land entrymen concerned and the application failed to show road rights-of-way were needed for the affected desert land entries.

APPEARANCES: W.F. Ringert, Esq., Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Farm Development Corporation (FDC) has appealed from a December 10, 1986, right-of-way decision by the Jarbridge Area Manager, Boise, Idaho District, Bureau of Land Management (BLM), denying application by FDC for a right-of-way for access roads across Federal lands in T. 6 S., R. 9 E., Boise Meridian, Idaho. The December 10 decision denied the application for two reasons: that FDC was not a proper applicant because it lacked a sufficient interest in the appurtenant desert land entries to which access was sought, and, second, because access to the irrigation system serving the entries was available within the desert land entries and the access roads sought by FDC were therefore not needed.

On appeal to this Board, FDC argues that the desert land entrymen whose entries are served by the roads in question should be allowed to substitute themselves for FDC, because the application for right-of-way was made pursuant to 43 CFR 2802.5. This regulation provides that agency approval for unauthorized rights-of-way in existence on the effective date of Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), may be obtained, free of processing costs and rental charges for the period of unauthorized use, for 4 years following the statute's effective date. The FDC application was made on July 30, 1984, the last day for filing applications under the regulation.

The reason that the entrymen of the desert land entries presumably served by the roads did not themselves apply for rights-of-way on or before the last day provided for by the regulation is that, on that day there were no entries in existence. The entries were cancelled by decision of this Board in United States v. Morris, 19 IBLA 350, 82 I.D. 146 (1975), aff'd Morris v. Andrus, 539 F.2d 851 (9th Cir. 1978), rehearing denied, 595 F.2d 1229 (1979), cert. denied, 444 U.S. 863 (1979). They were reinstated by Act of Congress on October 30, 1986, as an amendment to the Wild and Scenic Rivers Act, P.L. 99-590, 100 Stat. 3338-9 (1986).

FDC asserts that it has used the roads in question in connection with other lands owned by the corporation, and that since 1984 FDC has rented some of the desert lands served by the roads from BLM under a land use permit. While FDC does not deny that there are other means of access to the desert land entries affected, it argues that the entrymen should be allowed the benefit of the regulatory provision affording issuance of rights-of-way for previously unauthorized uses free of certain charges, because FDC's use of the land as the prior tenant of the entrymen should be considered to bridge the gap between the 1975 cancellation of the entries and their 1986 reinstatement.

The relationship between the entrymen and the corporation referred to by FDC was the subject of this Board's decision in the Morris case, cited above. In that decision it was held that the arrangement between the 12 desert land entrymen and FDC, now characterized by FDC as creating a tenancy, violated the provision of 43 U.S.C. § 329 (1970), prohibiting an association from holding more than 320 acres of desert land prior to patent. 19 IBLA at 371, 82 I.D. at 156.

FDC relies upon Alaska Placer Co., 19 IBLA 350, 82 I.D. 146 (1977), for an argument that the possession and use of the roads by FDC in this case can be tacked to the entrymen's claims now to permit them to take advantage of the application made by FDC pursuant to 43 CFR 2802.5. In Alaska Placer Company it was shown that a claim had been continuously worked by either the patent applicant or its predecessors for the required term of years. The occupancy of the predecessors was allowed to be tacked to the patent applicant's period of possession to satisfy the total time required to enable the patent application to proceed. In this case, however, assuming the cases are analogous, it does not appear that either the entrymen or FDC was in continuous possession of the entries and the rights-of-way. This argument must therefore be rejected as without basis in fact.

The relief sought by FDC in this appeal is the substitution of the entrymen for FDC, or their addition as parties in interest, "in order to give full effect to the timely filing made by FDC in its own behalf and as former tenant of the entrymen" (Statement of Reasons at 3). There has, however, been no appearance or application to appear as parties to this appeal by any of the entrymen. 1/

1/ The provision of the Wild and Scenic Rivers Act reinstating the desert land entries for the entrymen referred to by FDC provides, pertinently, the following names:

[1] On the record before us, therefore, there is no basis upon which we can afford FDC any relief. The regulations at 43 CFR Part 2800 governing rights-of-way administration provide that the authorized officer may deny an application for right-of-way to an unqualified applicant (43 CFR 2802.4(a)(3)), or if the right-of-way is inconsistent with management plans or with the public interest. 43 CFR 2802.4(a)(1) and (2). The statute governing the issuance of rights-of-way, 43 U.S.C. § 1761 (1982), limits such grants to specified uses, the utility of which must be documented by the right-of-way applicant prior to issuance. The statute provides, pertinently,

The Secretary concerned shall require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit and disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition, which he deems necessary

fn. 1 (continued)

"Sec. 702. The names of the entrymen, and the serial numbers of the desert land entries generally known as the "Sailor Creek Project", to which this title applies, are as follows:

Bureau of Land Management

Entryman	Serial number
G. Patrick Morris-----	Idaho 013820
John E. Roth-----	Idaho 013905
Elise L. Neeley-----	Idaho 013906
Lyle D. Roth-----	Idaho 013907
Vera M. Noble (Now Baltzor)-----	Idaho 014126
Charlene S. Baltzor-----	Idaho 014128
George R. Baltzor-----	Idaho 014129
John E. Morris (deceased)-----	Idaho 014130
Juanita M. Morris-----	Idaho 014249
Nellie Mac Morris (deceased)-----	Idaho 014250
Milo Axelsen-----	Idaho 014251
Peggy Axelsen-----	Idaho 014252"

The Act then provides that reinstatement shall be made on the following conditions:

"Sec 703. (a) The desert land entries identified in section 702 of this title are hereby reinstated. The entrymen, or the heirs or devisees of any deceased entryman, may--

(1) rescind any agreement which is prohibited by the Secretary of the Interior pursuant to regulations under section 7 of the Act (43 U.S.C. 329) within six months after the date of enactment of this title; and

(2) resubmit final proof of reclamation and cultivation of the land in accordance with the provisions of section 7 of the Act (43 U.S.C. 329) before December 31, 1988.

(b) The Secretary of the Interior shall issue patents to the entrymen named in section 702, or their heirs or devisees upon compliance with the provisions of subsection (a) and the submission of satisfactory final proof."

to a determination, in accordance with the provision of this act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

43 U.S.C. | 1761(b)(1) (1982).

There is nothing in the record to indicate how any entryman has used or will use the roads, nor are the entrymen identified as users of any of the roads identified. The FDC application alleges that FDC used the roads for "irrigation and farming operations" in "Sec. 16, T. 6 S., R. 9 E., B.M." Neither the application itself nor any of the material submitted in support of the application indicates that the application seeks to preserve rights claimed by the now reinstated entrymen. On the existing record, therefore, the decision is correct and must be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness  
Administrative Judge

I concur:

Bruce R. Harris  
Administrative Judge